FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Offshore Marine Services Pty Ltd [2012] FCA 498

Citation:	Fair Work Ombudsman v Offshore Marine Services Pty Ltd [2012] FCA 498
Parties:	**FAIR WORK OMBUDSMAN v OFFSHORE MARINE SERVICES PTY LTD (ACN 109 339 433) and MARITIME UNION OF AUSTRALIA**
File number:	WAD 251 of 2011
Judge:	**GILMOUR J**
Date of judgment:	17 May 2012
Catchwords:	**INDUSTRIAL LAW** - penalties - application for declarations that the respondent contravened s 346(a) of the *Fair Work Act 2009* (Cth) and s 792(1)(d) of the *Workplace Relations Act 1996* (Cth) - application for penalties pursuant to s 807(1)(a) of the *Workplace Relations Act 1996* (Cth) and s 546(1) of the *Fair Work Act 2009* (Cth) - factors relevant in determining an appropriate penalty - the circumstances under which the conduct took place - nature and extent of loss or damage - whether the respondent had contravened any Commonwealth workplace laws in the past – whether the breach arose out of one course of conduct - whether the breach was deliberate - the importance to be placed on the need to protect industrial freedoms - whether there was evidence of contrition - whether the respondent had taken any further action to ensure compliance - whether the respondent was co-operative - specific deterrence - general deterrence
Legislation:	*Workplace Relations Act 1996* (Cth) ss 298K, 792(1)(d), 778, 807(1)(a), 841(a) *Fair Work Act 2009* (Cth) ss 3(e), 336, 346(a), 546(1), 546(3)(a) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Item 11(1) of Part 3 of Schedule 2 *Crimes Act 1914* (Cth) s 4AA *Federal Court of Australia Act 1976* (Cth) s 21
Cases cited:	*Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)*

(2011) 205 IR 465
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia v QR Limited (No 2) [2010] FCA 65
Community & Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228
Construction, Forestry, Mining and Energy Union v Cahill (2010) 269 ALR 1
Draffin v Construction, Forestry, Mining and Energy Union (2009) 189 IR 145
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579
Finance Sector Union v Commonwealth Bank of Australia (2005) 224 ALR 467
Gibbs v Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Maritime Union of Australia v Geraldton Port Authority (No 2) (2000) 94 IR 404
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
McIver v Healey [2008] FCA 425
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
Kelly v Fitzpatrick (2007) 166 IR 14
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union (2008) 171 FCR 357
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Date of hearing:	17 April 2012
Place:	Perth
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	69
Counsel for the Applicant:	Mr R Bromwich (SC)
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondents:	Ms G Archer (SC)
Solicitor for the Respondents:	Corrs Chambers Westgarth

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 251 of 2011**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**OFFSHORE MARINE SERVICES PTY LTD** **(ACN 109 339 433)** **First Respondent**
	MARITIME UNION OF AUSTRALIA **Second Respondent**

JUDGE: **GILMOUR J**
DATE OF ORDER: **17 MAY 2012**
WHERE MADE: **PERTH**

THE COURT DECLARES THAT:

1. Pursuant to section 21 of the *Federal Court of Australia Act 1976* (Cth), the first respondent contravened:
   (a) section 792(1)(d) of the *Workplace Relations Act 1996* (Cth) (WR Act); and
   (b) section 346(a) of the *Fair Work Act 2009* (Cth) (FW Act).

THE COURT ORDERS THAT:

2. Pursuant to s 807(1)(a) of the WR Act and s 546(1) of the FW Act, the first respondent pay a penalty of $7500 for the contravention of s 792(1)(d) of the WR Act and s 346(a) of the FW Act.

3. The first respondent pay the penalty ordered above to the Consolidated Revenue Fund of the Commonwealth in accordance with s 841(a) of the WR Act and s 546(3)(a) of the FW Act.

4. That payment of the penalty referred to in Order 1 be made within 30 days of the date of this Order.

NOTE: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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AND:	**OFFSHORE MARINE SERVICES PTY LTD** **(ACN 109 339 433)** **First Respondent**
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JUDGE:	**GILMOUR J**
DATE:	**17 MAY 2012**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

1 The applicant seeks declaratory relief and the imposition of penalties as against the first respondent, Offshore Marine Services Pty Ltd (OMS) which has admitted the following contraventions alleged by the applicant:

(a) between 25 February 2009 and 30 June 2009, OMS contravened s 792(1)(d) of the *Workplace Relations Act 1996* (Cth) (WR Act) by refusing to employ Bruce Edward Love (Mr Love) and Lynne Christine Love (Mrs Love), (collectively, "the Loves") for a prohibited reason, namely that they were not members of the Maritime Union of Australia (the MUA); and

(b) between 1 July 2009 and December 2009, OMS contravened s 346(a) of the *Fair Work Act 2009* (Cth) (FW Act) by taking adverse action against each of the Loves by refusing to employ them because they were not members of the MUA.

2 The MUA is defending the proceedings which have yet to be tried.

3 The applicant read the affidavit of Georgina Kate Mayman Rosendorff affirmed 10 April 2012

4 OMS read the affidavits of Nicholas David Ellery sworn 3 and 16 April 2012.

5 The conduct of OMS has to be considered as two sets of contraventions only because of the repeal of the WR Act and subsequent commencement of the FW Act on and from 1 July 2009. The power of the Court to impose penalties in respect of the repealed provisions of the WR Act had been maintained by transitional provisions. Pursuant to item 11(1) of Part 3 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), the WR Act continues to apply, on and after 1 July 2009 for contraventions which took place before that date. Section 807(1)(a) of the WR Act provides that this Court may impose a pecuniary penalty for contraventions of Part 16 of the WR Act which deals with freedom of association. For breaches occurring on and after 1 July 2009, s 546(1) of the FW Act provides that this Court may order a person to pay a pecuniary penalty if the Court is satisfied the person has contravened the civil remedy provision.

6 Despite the fact that it was a legislative change which meant that separate contraventions had to be alleged for each half of 2009, each breach period remains, as a matter of law, a separate pair of contraventions in respect of each of the Loves: see by analogy *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16]-[18]. It is therefore necessary for the Court to consider whether there was in fact a single course of conduct straddling the two contravention periods for the purposes of determining a penalty. The applicant does not contend otherwise. I find that the contraventions reflect a single course of conduct adversely affecting each of the Loves taking place through most of 2009.

7 If, as in this case, two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. OMS should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what OMS did: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [71]. This task is distinct from, and in addition to, the final application of the "totality principle": *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46] per Stone and Buchanan JJ.

8 Once an appropriate penalty has been arrived at for each set of contraventions, that aggregate sum should then be examined to determine whether it is an appropriate response to the conduct which led to the breaches: *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30]; *Australian Ophthalmic Supplies* at [23] per Gray J; at [71] per Graham J; and [102] per Buchanan J. The Court should apply an "instinctive synthesis" in making this assessment: *Australian Ophthalmic Supplies* at [27] per Gray J and [55] and [78] per Graham J. This is an application of the totality principle.

9 It is appropriate to consider the maximum penalties that could be imposed on OMS, as part of the comparative exercise of assessing where the current contraventions sit: *Mornington Inn Pty Ltd* at [88] per Stone and Buchanan JJ. Section 807(2) of the WR Act and s 546(2) of the FW Act prescribe the maximum penalty that may be imposed by this Court to be, in the case of a body corporate, 300 penalty units, per contravention. Section 4(1) of the WR Act and s 12 of the FW Act provide that "penalty unit" has the same meaning as given by s 4AA of the *Crimes Act 1914* (Cth), being $110. The maximum penalties the Court can impose in respect of this matter, subject to what I say later as to a single course of conduct is:

(a) $66,000 for the WR Act contraventions – being two contraventions of the WR Act, one each in respect of each of Mr Love and Mrs Love; and

(b) $66,000 for the FW Act contraventions – being two contraventions of the FW Act, one each in respect of each of Mr and Mrs Love.

10 The agreed facts for the penalty hearing are set out in a statement of agreed facts (the Agreed Facts) filed on 10 February 2012.

Factors relevant to penalty

11 A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act has been conveniently summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[59] and adopted by Tracey J in *Kelly* at [14] as follows:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.

- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- Whether the party committing the breach had co-operated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- The need for specific and general deterrence.

12 Whilst the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion: *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]; *Australian Ophthalmic Supplies* at [91] per Buchanan J. The Court should not be distracted from paying "appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain the public confidence in the statutory regime which imposes the obligations": *Australian Ophthalmic Supplies* per Buchanan J at [91]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia v QR Limited (No 2)* [2010] FCA 652 at [34]-[35] per Logan J.

13 I will now deal with the factors relevant to this matter, bearing in mind that, as the applicant submits, correctly in my opinion, the dominant consideration in the determination of penalty in this matter is general deterrence.

Nature and extent of the conduct

14 The conduct of OMS, set out at paras 13-15, 29, 30, 31 and 32 of the Agreed Facts, was that it refused to employ the Loves because they were not members of the MUA, which was:

(a) a prohibited reason within the meaning of s 793(1)(b) of the WR Act; and

(b) an adverse action within the meaning of s 342 of the FW Act.

15 Such conduct is prohibited under s 792(1)(d) of the WR Act and s 346(a) of the FW Act.

16 The conduct of OMS occurred on a continuing basis over the period from 25 February 2009 to December 2009, in relation to two prospective employees, denying both partners in a marriage employment for prohibited reasons.

Circumstances in which the conduct took place

17 OMS conducts a business supplying personnel to offshore vessels operating within the oil and gas industry. Skilled Group Limited acquired OMS in September 2007. However, Skilled Group did not take over the direct management of OMS until July 2010, more than six months after the end of the contravention period.

18 The evidence discloses that the MUA repeatedly communicated to OMS its requirement that only MUA members be employed. The MUA communications to OMS on this point were often expressed forcefully and on occasion belligerently.

19 I accept that, in this regard, OMS faced not insignificant commercial pressure from the MUA. There is evidence that, if OMS had not complied with its demands, the MUA could have made commercial life very difficult for OMS with consequent significant adverse financial consequences for it. The fact that it was under such pressure does not mean that OMS is not liable for its conduct. It is. However, in assessing the overall criminality of the conduct, it is relevant to take into account the fact of the pressure.

20 In *Draffin v Construction, Forestry, Mining and Energy Union* (2009) 189 IR 145, the Full Court discussed the relative culpability of an employer that bowed to union pressure with the culpability of the Union. It held that the employers conduct was not as serious. The Court noted that the Union was the moving party and while the employer contravened the Act, it was because of the Union's conduct, and not because it chose to do so on its own initiative. Such, I find, is the position in this case.

Nature and extent of loss or damage

21 The Loves were denied employment as a result of the refusal of OMS to employ them because they were not members of an industrial association, the MUA. This enforcement of a "closed shop", in circumstances in which the Loves were willing to be union members, but were denied that by the MUA, had the result that they were denied the employment they sought for most of 2009. There is no issue that the Loves were otherwise suitable for employment by OMS.

Similar previous conduct

22 There is no evidence of any previous findings of contraventions of Commonwealth workplace laws by OMS. Recently, McKerracher J in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579 recognised that being a "first offender" is a relevant consideration when fixing a penalty. OMS should be treated as having first offender status.

Whether the breaches arose out of the one course of conduct

23 The applicant submits, and I accept, that while each contravention was not separate and distinct in time and place, the conduct of OMS affected each of Mr and Mrs Love individually in relation to their prospective employment sought at the relevant times. While it was a single course of conduct, it was protracted.

24 It is well-established that where a proscribed act impacted on more than one employee, a separate contravention will be taken to have occurred in respect of each employee: *Maritime Union of Australia v Geraldton Port Authority (No 2)* (2000) 94 IR 404 at [41]; *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228 at [3]. This conclusion was based on a construction of s 298K of the WR Act which, it was held, proscribed conduct in relation to a particular employee, not employees generally.

25 Middleton and Gordon JJ described the "course of conduct" principle and its potential application in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 at [39] in this way:

> The principle recognises that where there is an interrelationship *between the legal and factual elements of two or more offences* for which an offender has been charged,

> care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry.

26 Accordingly, in determining the appropriate penalty, the Court may take into account the fact that the contraventions arose out of a single course of conduct with the same factual circumstances namely, during the relevant period the Loves were refused employment with OMS on the basis that they were not members of the MUA. The applicant accepts that the contraventions of the WR Act and FW Act fall into a single group of freedom association contraventions. I consider this to be a concession properly made by the applicant. The maximum penalty in those circumstances would be:

(a) $33,000 for the contravention of s 792(1)(d) of the WR Act; and

(b) $33,000 for the contravention of s 346(a) of the FW Act.

Size of the business

27 OMS is a 'large sized' successful and well-resourced business having dedicated human resources staff. It clearly was able to obtain competent legal advice about its obligations as an employer under Commonwealth workplace laws, and the importance of compliance.

Deliberateness of the breaches

28 By reason of the conduct set out at paras 13 to 15 of the Agreed Facts, the applicant submits that there is no doubt the practice of OMS, by which membership with the MUA was a prerequisite for employment with OMS in areas covered by the MUA, was deliberate and calculated.

29 That this is so is evidenced from the following content of an email dated 6 November 2008 from Mr Quirk, the then HR Manager, to OMS Crewing Officers:

> .RE: MUA MEMBERSHIP
>
> Recently some seafarers have been engaged without a MUA membership. At present the MUA has 100% coverage on all positions that are covered by the MUA.
>
> MUA cover the following seagoing positions:
>
> CIR, IR, AB, Greaser (Engine Room Rating), Cooks, Stewards, deckhands, welders

and on some occasions Riggers.

Prior to being engaged offshore the question needs to be asked "are you in the MUA?"

If the answer is NO then a process needs to occur prior to the seafarer going offshore.

1. Advise Seafarer that the HR Manager needs to be consulted and we will get back in touch to discuss further.

2. HR manager is to determine whether or not no other MUA members are available for work using all available means available.

3. If no other MUA members are available for employment the HR manager is to discuss the situation with an Elected MUA official.

4. If MUA official agrees to consider the person going offshore then the seafarer is to be contacted and advised that he needs top have an appointment made at the MUA branch closest to the potential employees home address.

5. If the MUA Official decides to approve the person for a membership then the seafarer will pay for the membership and get signed up at the appointment with the union official.

6. When the Union official advises that the person has a Membership ("Book") then OMS will engage the seafarer for the position.

    - **At no point is the Person employed prior to having a Union membership and at no times are Flight Details to be sent to the person prior to a Union Membership being issued.**

    - **At no point is a Rating to be sent to sea without a MUA membership.**

    - **If at any times the crewing officer is in any doubt then the HR Manager is to be consulted.**

Regards

Marten Quirk
HR Manager

30 OMS accepts that its conduct was deliberate in the sense that it consciously had a practice of only employing members of the MUA. OMS enforced a pre-existing arrangement with the MUA whereby mandatory MUA membership was a means to prefer existing MUA members for employment, with the result that the Loves were illegally denied employment with OMS for most of 2009. OMS had the option of abandoning the arrangement and employing the Loves, or continuing the arrangement and denying that employment. The contemporaneous email communications with the Loves make it clear that the latter was chosen.

31 The respondent submits that there is no suggestion that the practice was designed for the purpose of breaching the law but rather that it was a practice that was designed to keep industrial peace. I give this submission no weight. The means of maintaining its stated object of industrial peace was to deliberately breach the law.

32 It is evident that during the relevant period, OMS Crewing Officer, Tamianne Wright, acted in accordance with the OMS employment practice which was being implemented by OMS at the time. This is evidenced by the emails sent by Ms Wright to the Loves, extracts from which are as follows:

25 February 2009:	"Please approach the MUA (union) in regards to your memberships and let them know that you have been offered a position and let me know if you need any more confirmation."
6 March 2009:	"I'm not sure what is happening at the moment in regards to the union, as we still have union members on the beach and we have to use this crew first."
22 June 2009:	"I just wanted to update you and let you know that as soon as we start to pick up and the Union start to look for new members I will let you know."
4 December 2009:	"I haven't forgotten you! I have had a look at the union list and there are 20 stewards on there but you never know over Christmas, we are always hunting!"

33 I find that Ms Wright communicated the above to the Loves because it was consistent with the OMS employment practice referred to above.

34 I find that the conduct of OMS, in effect, displayed a complete disregard towards the freedom of association provisions and protections contained in Commonwealth employment laws, as well as a complete disregard for the individual rights of the Loves.

35 While the respondent's conduct had the effect that the Loves were discriminated against and treated unfairly, there is no suggestion in this case of any attempt by OMS to force an unwilling employee to join the MUA. There is no evidence or suggestion that the Loves did not want to join this union. Indeed, the email correspondence suggests that the Loves had no issue with joining the union, and tried to join the union. The respondent was

not interfering with their freedom of association in that sense. Nonetheless, OMS' policy demanded that the Loves be members of the MUA or they would not be considered for employment. The fact that the Loves were willing to become members of the MUA is beside the point.

Ensuring compliance

36 The importance of employees exercising their rights to freedom of association is central to the objects of Commonwealth workplace laws. Section 778 of the WR Act states that the objects of Part 16 of the Act include:

> (c) to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association;
>
> (d) to provide effective remedies to penalise and deter persons who engage in conduct which prevents or inhibits employers, employees or independent contractors from exercising their rights to freedom of association.

37 Section 336 of the FW Act states that the objects of Part 3-1 include:

> (b) to protect freedom of association by ensuring that persons are:
> ...
> (i) free to become, or not become, members of industrial associations.

38 Relevantly, s 3(e) of the FW Act provides that one of its primary objectives is:

> ... enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.

39 The Courts have placed considerable weight on the importance of the need to protect industrial freedom of association when imposing penalties. Relevantly, Barker J recently said in *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* (2011) 205 IR 465 at [19]:

> The law of Australia has for a long time emphasised the importance of industrial freedom of association. The FW Act marks out industrial freedom of association as one of its important objectives. I take into account in this case the need for a pecuniary penalty to reflect the importance of the maintenance of that objective of the FW Act.

40 The actions taken by OMS against the Loves, for prohibited reasons, are contrary to the observance of the freedom to associate which the WR Act was designed to protect. The importance of employees exercising their right to freedom of association continues to be recognised under the FW Act. Whilst they were not unwilling to join the MUA the fact is that the Loves were required to do so as a pre-condition to their employment by OMS. The Loves free choice to join or not to join the MUA was taken from them. It is that denial of employment for a prohibited reason, later as a prohibited adverse action, that is the gravamen of the contraventions.

41 The Court in a case such as this should give effect to the seriousness of employer obligations under Commonwealth workplace laws, the impact upon individuals whose rights have been compromised, and the integrity of the workplace relations system generally, when assessing an appropriate penalty for a contravention.

42 The respondent accepts that its conduct was wrong, that its treatment of the Loves was unfair and that its breaches of the provisions are serious. However, it submits that the circumstances in this case place the offending towards the lower end of the scale.

Contrition, corrective action, co-operation with authorities

43 This factor involves three related yet separate elements of contrition, corrective action and co-operation. Each of these has application in this case.

Contrition

44 The applicant has properly acknowledged that there is evidence of contrition by OMS by reason of its admissions as well as to entering into an agreed statement of facts.

45 Contrition may also be inferred from a number of other facts in this case:

(a) the timing of the admissions – at the earliest reasonable opportunity, and without any defence having been filed;

(b) co-operation by OMS;

(c) the subsequent action by the new management of OMS in relation to:

(i) training; and

(ii) taking action against the MUA.

46 Very recently, OMS has formally apologised to the Loves, and offered to refund the money they spent on training. The email correspondence at the time of the offending conduct reveals a friendly relationship between the Loves and relevant staff member of OMS, and reveals that the Loves did not bear OMS any ill-will for its conduct. Nevertheless, it was appropriate for OMS to formally acknowledge its wrong-doing to the Loves, and it has done this. I accept that the apology was genuine and not merely tactical. OMS is to be commended for this.

Corrective Action

47 The Agreed Facts outline the measures that OMS have taken to prevent further contraventions. Upon commencement of employment with OMS, all employees now undertake and complete a number of training courses. Additionally, all crewing officers now receive comprehensive training with respect to unacceptable behaviour in the workplace, with emphasis placed on freedom of association. The applicant is unaware of any other measures that have been taken by OMS to prevent further contraventions.

Co-operation

48 The applicant acknowledges that since the initial contact with the Fair Work Inspectors, OMS has demonstrated a reasonable level of co-operation. OMS indicated that they would admit the contraventions as alleged in the statement of claim and subsequently entered into the Agreed Facts in relation to those contraventions. OMS has complied with notices to produce records or documents, and Mr Marten Quirk, its then Human Resources Manager, voluntarily participated in a record of interview with the Inspectors during the applicant's investigation stage. Mr Quirk also participated in a meeting with Inspectors, some months prior to the interview. He also agreed to participate in a second interview, and voluntarily provided a written statement to the applicant. Indeed OMS has agreed to assist the applicant in its related prosecution of MUA. OMS has agreed, in this respect, to waive any issues of confidentiality so that a former employer, Mr Del Rosso, may be approached, spoken to and secured as a witness for the applicant.

49 Mr Quirk has agreed to give evidence on behalf of the applicant in relation to its case against the MUA. He is incorrectly identified in the Agreed Facts as being the OMS General

Manager Crewing from September 2010 to present. Whilst still employed by OMS he no longer holds that position.

50 All of this has facilitated the administration of justice in this case.

51 I find that there has been a high level of co-operation manifested by OMS and this is to its credit.

52 The respondent acknowledges that the admission of liability is taken into account of itself, and cannot be 'double counted'. However, the other components of the co-operation warrant additional recognition.

53 The applicant accepts that a discount on account of OMS' admission is appropriate in the circumstances and contends that the discount should be in the order of 20%. The respondent contends that it is entitled to a greater discount at the top of the range for the admission of liability. It says that it was made at the earliest reasonable opportunity. There was an issue as to whether this last assertion was correct. The applicant submitted that the admission was delayed. I do not accept that submission for the following reasons.

54 The statement of claim was filed on 28 June 2011. The solicitors for OMS wrote to the applicant's solicitors on 13 July 2011, raising a number of questions about the commencement of the proceedings. This letter was not directed to the substance of the breaches, and did not make any comment as to whether the allegations were admitted or denied. The applicant's solicitors did not provide a substantive response until 13 September 2011. In the meantime, the parties had agreed to meet on 16 September 2011 to discuss the future progress of the matter. On 16 September 2011, the applicant and OMS reached agreement in principle. It was agreed that a statement of agreed facts would be prepared and that the allegations would be admitted.

55 Against that background I find that the admission of liability was made at the earliest reasonable opportunity.

Specific and general deterrence

56 It is well-established that both specific and general deterrence are significant factors

which are relevant to the imposition of penalties under the WR Act and FW Act: see *Community and Public Sector Union* at [9]; *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 at [60]. Given legislative changes and increases in penalties in recent years, a "light handed approach" to the imposition of civil penalties for contraventions of industrial law is no longer applicable: *Finance Sector Union* at [72].

Specific deterrence

57 Justice Gray in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [37] observed:

> Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur.

58 I accept, as the applicant submits, that given the co-operation and admission by OMS, the need for specific deterrence is not a significant consideration in this matter. The respondent is a first offender, admitted liability and has been co-operative, does not have any prior contraventions recorded against it for previous similar conduct.

59 Moreover, after the period over which the breach occurred, Skilled Group took over the direct management of OMS. It took steps to ensure that staff were fully trained in relation to adverse action and discrimination. The new management also took action against the MUA to stop unlawful industrial action and to demonstrate that it will not, in the future, bow to union pressure. All of this demonstrates that the new management is not in need of being deterred from engaging in the sort of conduct that is the subject of this case.

General deterrence

60 The role of general deterrence in determining the appropriate penalty is illustrated by the following statement of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93]:

> In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from

> contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: *R v Thompson* (1975) 11 SASR 217.

61 Similarly in *Community and Public Sector Union* at [9] Finkelstein J said:

> ... even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct.

62 As Barker J stated in *Australian Licensed Aircraft Engineers Association* at [20]:

> At a general level, persons in the position of an employer must receive a message, indicated by the imposition of a pecuniary penalty, that much more than lip service is to be paid to the objectives of the *FW Act* in relation to industrial freedoms.

63 The applicant submits that general deterrence is an important factor in the present case, and that such a message ought be delivered by the Court to the general community and employers particularly, that the breaches by OMS were substantial and unacceptable contraventions of the freedom of association provisions of Commonwealth workplace laws.

64 The respondent concedes that general deterrence is a relevant consideration and submits that this object can be achieved not only by the penalty imposed but also by the declaratory orders to be made by the Court to which it consents. It further submits that there is significant deterrence in the bringing of proceedings by itself: *Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 at [117].

65 Finally, it submits that the negotiated outcome releases resources of the applicant that might otherwise have been devoted to this matter, thereby allowing those resources to be used in pursuit of other contraventions which in turn increases deterrence: *Australian Building and Construction Commissioner* at [118].

66 Whilst I regard the submissions put by OMS as having some weight, I nonetheless consider the imposition of a monetary penalty as carrying the greatest impact in terms of general deterrence.

Totality principle and "instinctive synthesis" test

67 Having fixed an appropriate penalty for the contraventions, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the contraventions, and the penalties imposed are not such as to be oppressive or crushing.

Conclusion

68 I have concluded, having regard to all of these factors that a penalty in the low to mid range ought to be imposed. I fix that amount at $7500.

69 I will make an order pursuant to s 841(a) of the WR Act and s 546(3)(a) of the FW Act, requiring that this penalty imposed on OMS be paid within 30 days into the Consolidated Revenue Fund of the Commonwealth.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 17 May 2012